Filed 11/3/10 P. v. Medina CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DANNY MEDINA, Defendant and Appellant.	B214954 (Los Angeles County Super. Ct. No. VA095550)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip H. Hickok, Judge. Conditionally reversed and remanded with directions.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Danny Medina appeals from the judgment entered after he was convicted by a jury of carjacking and second degree robbery. He was sentenced to an aggregate term of 15 years in state prison.[1] Medina contends the trial court committed prejudicial error in instructing the jury with CALJIC No. 2.62 (defendant's failure to explain or deny adverse testimony) and in failing to conduct an in camera review of police personnel files pursuant to Evidence Code sections 1043 and 1045 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We conditionally reverse the judgment and remand for the limited purpose of conducting the required in camera review.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Summary of Trial Evidence*

a. *Prosecution evidence*

Shortly before midnight on May 27, 2006, Alfredo Garcia was at a party in Los Angeles with friends Lionel Soto and Alex Diaz. Garcia had consumed five or six beers and was feeling the effects of the alcohol. Garcia went outside to his Chevy Suburban truck and was approached by two strangers, whom he described as a Hispanic man, and a man wearing a hooded sweater. Garcia testified he saw the face of the Hispanic man, but not the face of the man wearing the hooded sweater. The Hispanic man briefly spoke to Garcia, pressed a handgun against Garcia's ribs, and demanded the keys to Garcia's

---

[1] Medina was charged by information with carjacking (Pen. Code, § 215, subd. (a), count 1), second degree robbery (Pen. Code, § 211, count 2), and hit and run driving (Veh. Code, § 2002, subd. (a), count 3). As to count 2, the information alleged a principal was armed with a handgun during the commission of the robbery (Pen. Code, § 12022, subd. (a)(1)). As to all counts, the information specially alleged defendant had previously suffered one serious or violent felony within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and Penal Code section 667, subdivision (a)(1). Count 3 was dismissed during trial, pursuant to Medina's motion (Pen. Code, § 1118.1). The jury found Medina guilty of counts 1 and 2, but found the handgun allegation not true. In a bifurcated proceeding, Medina waived his trial rights and admitted the prior conviction allegations. He was sentenced to the middle term of five years for carjacking, doubled to 10 years under the Three Strikes law, plus five years under Penal Code section 667, subdivision (a)(1). His sentence for robbery was stayed (Pen. Code, § 654).

Suburban. The man with the hooded sweater then searched Garcia. After finding the keys to Garcia's Suburban, Garcia's cellular phone and some cash, the man with the hooded sweater left. The Hispanic man stayed behind, and demanded that Garcia go with him. Garcia was too frightened to respond, and the Hispanic man soon left.

Garcia returned to the party and told Soto and Diaz that his Suburban had been stolen. The three of them left in Soto's car to find Garcia's Suburban. Soto drove down the street, and Garcia saw his Suburban near the corner. Soto began to follow Garcia's Suburban and the driver immediately sped up. Neither Soto nor Garcia could see inside the Suburban because its back windows were darkly tinted.[2] Soto remained behind the Suburban as the two vehicles ran a red light, prompting a pursuit by sheriff's deputies. Shortly thereafter, Garcia's Suburban collided with a parked car. The driver of the Suburban apparently fled, but left the gear shift in "drive," so the Suburban kept moving. Soto drove past Garcia's Suburban and stopped to let Garcia out. Garcia ran up to his Suburban and shifted the gear into "park." Garcia was thereafter detained by sheriff's deputies and placed in the back seat of a patrol car.

Soto had driven past the collision and stopped. He and Diaz got out of the car and ran back, catching up with Medina, who was running away from the collision. Soto joined Diaz in punching Medina until sheriff's deputies intervened. Soto and Diaz were detained separately from Medina in the back seat of a patrol car. Medina was never seated in the same patrol car with Garcia.

In a field show-up, Garcia identified Medina as the man involved in the crimes against him; Medina was wearing a dark blue sweatshirt. Neither Garcia nor Soto was able to identify Medina at trial.

At one point, when Medina was in handcuffs in the back seat of the patrol car, sheriff's deputies saw him attempting to use a cellular phone. Sheriff's deputies immediately retrieved the cellular phone, and determined it belonged to Garcia.

---

[2] Diaz did not testify at trial.

b. *Defense evidence*

Medina testified in his defense of mistaken identity that he and Anna Leyva, a girlfriend, were waiting outside for a ride from Anna Leyva's sister. Medina heard sirens, looked up and saw a Suburban crash into a nearby parked car. A man emerged from the driver's side of the Suburban, jumped over a fence and disappeared from view. No one else came out of the Suburban. Shortly thereafter, a car drove by, dodged the still-moving Suburban and stopped. A man came out of the car, and Medina crossed the street because he "feared for [his] life." Medina then testified two men left the car, approached, and began cursing and repeatedly punching him. They accused Medina of carjacking. Medina kept denying it and did not fight back. Sheriff's deputies arrived and detained the three of them. Anna Leyva ran off somewhere while Medina was getting beat up.

According to Medina, he was handcuffed and seated in three different patrol cars that night. In one patrol car, he heard the ring tone of a cellular phone next to him on the back seat. The cellular phone did not belong to him. When it lit up and continued to ring, Medina grabbed the cellular phone to push it away from him. Knowing the sheriff's deputies were looking for this particular cellular phone, Medina attempted to tell them that it was on the seat next to him in the patrol car. Sheriff's deputies eventually saw the cellular phone and removed it. Medina denied taking Garcia's keys to his Suburban, his cellular phone or his cash. He denied ever being inside the Suburban. Medina admitted he was convicted of a felony in 2002.

c. *Rebuttal evidence*

Los Angeles County Sheriff's Deputy James Ponsford testified Medina was seated in only one patrol car, not three, until he was transported from the scene. Ponsford advised Medina of his right to remain silent, to the presence of an attorney and, if indigent, to appointed counsel (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]), which Medina waived. Medina told Ponsford that prior to being detained by sheriff's deputies, he was in the area after having purchased rock cocaine and

visited two friends ("Pewee and Twin"). Medina then saw sheriff's deputies chasing a car.

2. *The Pitchess Motion*

Before trial, pursuant to Evidence Code sections 1043 and 1045 and *Pitchess*, Medina moved for discovery of the personnel records of the Los Angeles County Sheriff's Deputy M. Williams, the officer who conducted the field show-up identification of Medina and witnessed Medina's attempt to use the cellular telephone. The motion sought evidence the deputy had previously engaged in "the use of excessive force, dishonesty, false arrest, illegal search and seizure, and/or the fabrication of charges/evidence." The motion was supported by a declaration from Medina's counsel, John A. McDonald. According to the McDonald declaration, made upon information and belief, Garcia "was not and is not able to identify Medina as the person who carjacked him;" and Medina never "attempted to make a phone call while handcuffed and otherwise detained in [the] patrol car." McDonald asserted Medina "maintains that the evidence regarding the cell[ular] phone and identification was fabricated" by the deputy."

The trial court heard and denied Medina's motion and declined to conduct an in camera review of the personnel records to determine if they contained any of the requested materials, finding Medina had failed to present "a sufficient[] . . . factual scenario" in light of the "civilian witnesses" [presumably Soto and Diaz] "who detained [Medina] after he's allegedly fleeing from the car that he carjacked." The court also found that whether Medina was making a call on the cellular phone "is the most inconsequential element of the People's case."

DISCUSSION

1. *Instructing the Jury with CALJIC No. 2.62 Did Not Constitute Reversible Error*

Medina contends the court committed reversible error by instructing the jury with CALJIC No. 2.62.

Without objection or a request for modification, the trial court instructed the jury with CALJIC No. 2.62, the pattern instruction advising the jury regarding the adverse inferences that may be drawn from a testifying defendant's failure to explain or deny

evidence against him or her. CALJIC No. 2.62 provides, "In this case defendant has testified to certain matters. [¶] If you find that the defendant failed to explain or deny any evidence against him introduced by the prosecution which he can reasonably be expected to deny or explain because of facts within his knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn there from those unfavorable to the defendant are more than probable. [¶] The failure of a defendant to deny or explain evidence against him does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that he would need to deny or to explain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain this evidence."

"The trial court has the duty to instruct on general principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty 'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' [Citations.] 'It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.'" (*People v. Saddler* (1979) 24 Cal.3d 671, 681; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469.) Instructions in accordance with CALJIC No. 2.62 are proper, for example, when "a defendant testifies but fails to deny or explain inculpatory evidence or gives a 'bizarre or implausible' explanation." (*People v. Sanchez* (1994) 24 Cal.App.4th 1012, 1029-1030.) However, contradictions between the defendant's testimony and his or her prior statements or between the defendant's testimony and the testimony of prosecution witnesses do not justify the instruction. (See *Saddler*, at p. 682 ["a contradiction is not a failure to explain or deny"]; *Lamer*, at p. 1469.)

A preliminary question is whether, as the People maintain, Medina has forfeited this issue on appeal by failing to object to the instruction at trial. Despite the lack of an objection, the issue regarding CALJIC No. 2.62 has not been forfeited, as an "appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Pen. Code, §§ 1259, 1469; see also *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249 ["Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim--at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was."].)

Medina contends the trial court improperly charged the jury with CALJIC No. 2.62 because he never failed to explain or deny any material evidence within the scope of cross-examination. Medina further argues the instruction violated his constitutional rights of due process and a fair trial in that it allowed the jury to draw inferences unfavorable to him merely based on any inconsistencies between his testimony and that of the prosecution witnesses, rather than based on his failure to explain or deny *significant* prosecution evidence. The result was to unfairly single out his testimony for negative scrutiny, which undermined the presumption of innocence.

Medina overlooks the decisional authority allowing the instruction to be given when the defendant's testimony, while superficially accounting for his or her conduct, nonetheless appears bizarre or implausible (*People v. Sanchez, supra,* 24 Cal.App.4th at pp. 1029-1030; *People v. Mask* (1986) 188 Cal.App.3d 450, 455; *People v. Belmontes* (1988) 45 Cal.3d 744, 784, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421) as was Medina's story about finding Garcia's cellular phone on the backseat of the patrol car (grabbing the unfamiliar phone in order to push it away,

realizing its unique importance to sheriff's deputies and trying to inform them of its presence).[3]

Even if we were to agree with Medina's argument, any error in giving the instruction could not have been prejudicial. Error in giving this instruction is only prejudicial if it is reasonably probable a more favorable verdict would have resulted had it not been given. (*Saddler, supra*, 24 Cal.3d at p. 683; see *People v. Lamer, supra*, Cal.App.4th 1463, 1469 [applying harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, to error in giving CALJIC No. 2.62].) CALJIC No. 2.62, which does not direct the jury to make an adverse inference, actually contains instructions favorable to the defense, cautioning that "the failure to deny or explain evidence does not create a presumption of guilt, or by itself warrant an inference or guilt, nor relieve the prosecution of the burden of proving every essential element of the crime beyond a reasonable doubt." For this reason, courts have routinely found any error in giving CALJIC No. 2.62 is harmless. (*Lamer*, at p. 1472 ["we have not found a single case in which an appellate court found the error to be reversible under the *Watson* standard. On the contrary, courts have routinely found that the improper giving of CALJIC No. 2.62 constitutes harmless error"].) Moreover, the jurors in this case were told to disregard any instructions that were not supported by the facts (CALJIC No. 17.31), and it is therefore reasonable to presume that if there was no evidence to support CALJIC No. 2.62, they would have ascertained that fact and disregarded the instruction in reaching their verdict. (*Saddler*, at p. 684.) Accordingly, we find no reasonable likelihood of a different verdict had the instruction not been given.

2. *Good Cause Was Established to Conduct an In Camera Review of the Deputy's Personnel Records*

"For approximately a quarter-century our trial courts have entertained what have become known as *Pitchess* motions, screening law enforcement personnel files in camera for evidence that may be relevant to a criminal defendant's defense." (*People v. Mooc*

---

[3] Because we find no instructional error on this ground, we need not address the argument given by the People to justify giving the instruction.

(2001) 26 Cal.4th 1216, 1225 (*Mooc*) (fn. omitted); see *Pitchess v. Superior Court, supra,* 11 Cal.3d 531.) To balance the defendant's right to discovery of records pertinent to his or her defense with the peace officer's reasonable expectation that his or her personnel records will remain confidential, the Legislature has adopted a statutory scheme requiring a defendant to meet certain prerequisites before his or her request may be considered. (See §§ 832.5, 832.7 and 832.8; Evid. Code, §§ 1043-1047 [statutory scheme governing *Pitchess* motions].) Specifically, a defendant seeking discovery of a peace officer's confidential personnel record must file a written motion describing the type of records or information sought (Evid. Code, § 1043) and include with the motion an affidavit demonstrating "good cause" for the discovery and the materiality of such evidence relative to the defense. (*Mooc*, at p. 1226; see also *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019 (*Warrick*).) The information must be requested with "sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information." (*Mooc*, at p. 1226.)

Once the trial court concludes the defendant has satisfied these prerequisites, the custodian of records is obligated to bring to court all documents "potentially relevant" to the defendant's motion. (*Mooc, supra,* 26 Cal.4th at p. 1226.) The trial court must then examine the information in chambers, outside the presence of any person except the proper custodian "and any other persons as the person authorized to claim the privilege is willing to have present." (Evid. Code, §§ 915, subd. (b), 1045, subd. (b); see *Warrick, supra,* 35 Cal.4th at p. 1019.) Subject to certain statutory exceptions and limitations,[4] the trial court must then disclose to the defendant "'such information [that] is relevant to the subject matter involved in the pending litigation.'" (*Mooc*, at p. 1226; *Warrick*, at

---

[4] The trial court must exclude from discovery: "(b)(1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought. [¶] (2) In any criminal proceeding the conclusions of any officer investigating a complaint filed pursuant to Section 832.5 of the Penal Code. [¶] (3) Facts sought to be disclosed that are so remote as to make disclosure of little or no practical benefit." (Evid. Code, § 1045; see also *Mooc, supra,* 26 Cal.4th at pp. 1226-1227.)

p. 1019.) "A trial court's ruling on a motion for access to law enforcement personnel records is subject to review for abuse of discretion." (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

Medina challenges the trial court's denial of his motion, arguing he established the necessary good cause to review the records of Deputy Williams. He argues he satisfied the "relatively low threshold" for establishing good cause for an in camera review. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83-84; *Warrick*, *supra*, 35 Cal.4th at p. 1019.)

We agree. The Supreme Court made clear in *Warrick* that, in addition to a specific description of the discovery sought and a demonstration of a logical link between the defense proposed and the pending charge, good cause for *Pitchess* discovery requires only that the defendant present a factual scenario of officer misconduct "that might or could have occurred[,]" explaining that "a credibility or persuasiveness standard at the *Pitchess* discovery stage would be inconsistent with the statutory language." (*Warrick, supra,* 35 Cal.4th at pp. 1021, 1026.) The Court also held that, depending on the circumstances of the case, the defendant's factual scenario "may consist of a denial of the facts asserted in the police report." (*Id.* at pp. 1024-1025.) Although a factual scenario need not be reasonably probable or credible, and although the denial of facts in a police report sometimes may establish the required plausible factual foundation, a sufficient plausible scenario must present "an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Id*. at pp. 1024-1026.)

Although the foundation for Medina's claim of police misconduct is less than overwhelming, in light of the minimal standard enunciated in *Warrick*, the trial court should have granted the motion and conducted an in camera review of the deputy's personnel records to determine if there was any relevant material responsive to

allegations of "dishonesty, false arrest, and/or fabrication of charges/evidence."[5] Under Medina's factual scenario of police misconduct, contrary to the arresting officers' report, Garcia did not identify him as the robber or carjacker in the field show-up. Plausibility, not ascertained fact, is the linchpin under *Warrick*; and it is conceivable that Deputy Williams fabricated Garcia's identification of Medina at the field show-up, particularly in view of Garcia's statement to Medina's parole agent one week later of being "intoxicated" at the time, and "probably" unable to identify the suspect who had been arrested. Medina's defense was mistaken identity. Garcia was the sole witness to the robbery, and the sole witness asked to participate in the field show-up. The declaration "establish[ed] not only a logical link between the defense proposed and the pending charge, but also [] articulate[d] how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Warrick, supra,* 35 Cal.4th at p. 1021.)

Because the trial court erred by denying defendant's pretrial *Pitchess* motion in its entirety without the required in camera review, we conditionally reverse his judgment of conviction and remand the matter to resolve the issue of prejudice as follows: (1) The trial court must conduct an in camera inspection of the requested personnel records for relevance; (2) if the trial court's inspection on remand reveals no relevant information, the trial court must reinstate the judgment of conviction; and (3) if the inspection reveals relevant information, the trial court must order disclosure to defendant, allow him an opportunity to demonstrate prejudice and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. If defendant is unable to show any prejudice, the conviction and sentence are to be reinstated. (*People v. Gaines* (2009) 46 Cal.4th 172, 181.)

---

[5] To the extent defendant's motion sought discovery of information from the personnel files concerning excessive force and illegal search and seizure, it was properly denied.

DISPOSITION

The judgment is conditionally reversed. On remand the trial court is to conduct an in camera review of the requested personnel records, as identified in this opinion, for relevance. If that review reveals no relevant information, the trial court shall reinstate Medina's original judgment of conviction and sentence.

If the in camera review reveals relevant information, the trial court must order disclosure, allow Medina an opportunity to demonstrate prejudice and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. If Medina is unable to show any prejudice, the original judgment and sentence are to be reinstated.

In all other respects Medina's convictions are affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.